FILE COPY

Office Supreme Court,
FILED
FEB 4 19
CHARLES

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 2

BAYSIDE FISH FLOUR COMPANY,
*Appellant,*

vs.

J. DALE GENTRY, EARL B. GILMORE, I. ZELLERBACH, ET AL.,
*Appellees.*

## APPELLEES' SUPPLEMENTAL BRIEF

U. S. WEBB,
Attorney General of the State of California,

RALPH O. MARRON,
Deputy Attorney General,

DARWIN BRYAN,
Deputy Attorney General,
*Attorneys for Appellees.*

CALIFORNIA STATE PRINTING OFFICE

28815

## TOPICAL INDEX


| | Page |
|---|---|
| STATEMENT OF FACTS | 1 |
| HISTORY OF LEGISLATION DEALING WITH REDUCTION | 3 |
| THE LEGISLATION IN QUESTION IS A VALID EXERCISE OF THE POLICE POWER AND NOT REPUGNANT TO ANY CONSTITUTIONAL PROVISION | 17 |
| THE LEGISLATION DOES NOT DEPRIVE APPELLANT OF THE EQUAL PROTECTION OF LAW | 25 |
| CONCLUSION | 27 |

## TABLE OF AUTHORITIES


| | Page |
|---|---|
| Bayside Fish Flour Company vs. Zellerbach, 124 Cal. App. 564 | 12 |
| Ex parte Maier, 103 Cal. 476 | 18, 21 |
| Fish and Game Code—Sections 1010, 1064, 1065, 1068 and 1076 | 15 |
| Foster Fountain Packing Co. vs. Haydel, 278 U. S. 1 | 24 |
| Mono Power Co. vs. Los Angeles, 33 Cal. App. 675 | 27 |
| People vs. Magner, 97 Ill. 320 | 18 |
| People vs. Monterey Fish Products Co., 195 Cal. 548 | 10, 26 |
| Silz vs. Hesterberg, 211 U. S. 31 | 18, 19 |
| Soon Hing vs. Crowley, 113 U. S. 703 | 26 |
| Statutes of 1917— | |
| Page 1275 | 3 |
| Page 1673 | 4 |
| Chap. 803, Secs. 4 and 7 | 6 |
| Statutes of 1919— | |
| Page 1203 | 7 |
| Chap 551, Secs. 4 and 5 | 8, 10 |
| Statutes of 1921—page 459 | 9 |
| Statutes of 1925— | |
| Page 595 | 10 |
| Chap. 340, Sec. 4 | 10 |
| Statutes of 1929— | |
| Page 901 | 11, 16 |
| Chap. 525, Sec. 4 | 11 |
| Chap. 525, Sec. 5 | 12 |
| Union Fishermen's etc. Co. vs. Shoemaker, 36 Ore. 16, 193 Pac. 476 | 18, 22 |
| Van Camp Sea Food Co. vs. Department of Natural Resources, 30 Fed. (2d) 111 | 19 |

IN THE

# SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1935

No. 2

BAYSIDE FISH FLOUR COMPANY,
*Appellant,*

vs.

J. DALE GENTRY, EARL B. GILMORE, I. ZELLERBACH, ET AL.,
*Appellees.*

## APPELLEES' SUPPLEMENTAL BRIEF

By permission of this Court Appellees file this supplemental brief in order to more fully review the history of the questioned legislation.

## STATEMENT OF FACTS

Appellant is a corporation which was engaged in the business of manufacturing under a patented process fish flour from sardines caught on the high seas beyond the three mile limit of the State of California. It had two reduction plants, one located at Point San Pablo in the County of Contra Costa, the other at the City of Monterey in the

County of Monterey. Appellant was licensed for the season 1933–1934, pursuant to the provisions of Section 1010 of the Fish and Game Code of the State of California, "to can, cure, preserve or pack fish which are taken in the waters of this State (California) or fish brought into this State in a fresh condition or to manufacture fish scrap, fish meal, fish oil, chicken feed or fertilizer from fish or fish offal, or to deal in mollusks or crustaceans by wholesale." In addition to this license appellant was issued a permit, pursuant to the provisions of Section 1068 of the Fish and Game Code, to take and use by a reduction or extraction process not to exceed eleven thousand (11,000) tons of sardines at both its reduction plants. In violation of the terms of this permit appellant reduced in excess of eleven thousand (11,000) tons, and after exceeding the permitted amount continued the operation and the reduction of fish at both its plants. An action was commenced in the Superior Court of the State of California, in and for the County of Monterey, by the People of the State of California in accordance with the provisions of Section 1076 of the Fish and Game Code, in which action an injunction was issued against Bayside Fish Flour Company prohibiting it from taking and using by a reduction or extraction process any further sardines at its plant in the County of Monterey. No appeal was taken by the Bayside Fish Flour Company from the order granting this injunction. The

present proceeding was commenced in the United States District Court, Southern Division of the Northern District of California, seeking to enjoin the members of the Fish and Game Commission and the Attorney General of the State of California from proceeding in the Superior Court of the State of California, in and for the County of Contra Costa, to abate the reduction plant belonging to the Bayside Fish Flour Company located in that county. The Attorney General had prepared appropriate pleadings and intended to proceed under the provisions of Section 1076 of the Fish and Game Code to abate the reduction plant belonging to appellant and located in Contra Costa County.

## HISTORY OF LEGISLATION DEALING WITH REDUCTION

The Legislature of California in 1917 adopted two acts dealing generally with commercial fisheries and the products thereof. The first measure was an act entitled:

> "An act to license canners, curers, preservers and packers of fish and handlers of crustaceans and mollusks, and providing a revenue therefrom for the conservation, propagation and restoration of fish in the State of California, and providing for a record of fish caught or received, and providing penalties for the violations of the provisions thereof, and repealing all acts and parts of acts in conflict therewith."
>
> *Statutes of 1917, page 1275.*

By the first section of this Act all persons engaged in the business of canning, curing, preserving or packing fish caught in the waters of California or brought into California in a fresh condition and those persons engaged in the reduction of fish, or dealing in mollusks or crustaceans by wholesale, were required to procure a license. This Act in general provided for the keeping of a record of fish purchased, the giving of receipts to fishermen delivering fish, the imposition of a privilege tax and the expenditure of the funds collected for inspection and conservation work.

At the same session the Legislature adopted an Act entitled:

> "An act to empower the state market director of California to regulate and control the business of buying and selling fresh fish; to regulate the destruction of food fish; to create a state fish exchange; to license those engaged in marketing fish; to create a state fish exchange fund and a revolving fund; to provide penalties for violations of this act; to investigate and report on the fish industry; and to promote the sale of fish."

*Statutes of 1917, page 1673.*

Sections 4 and 7 of that Act provide:

> "Sec. 4. It is hereby declared that the ownership and title to all fish found in the waters under the jurisdiction of the state are in the State of California; no such fish shall be caught, taken or killed in any manner or at any time

except that the person so catching, taking or killing or having the same in his possession, irrespective of the manner in which they were obtained, shall by such act or possession thereby consent that the title to such fish shall be and remain in the State of California for the purpose of regulating and controlling the use and disposition of same after such catching, taking or killing, except that the title to such fish legally taken shall vest in the person so taking or possessing them, subject to the restrictions and provisions of law. All fish found in the possession of a person within the State of California shall be presumed to have been taken under the jurisdiction of the state."

"Sec. 7. It shall be unlawful for any one to destroy, or cause or permit to be destroyed any food fish in excess of fifty pounds within one day of twenty-four hours or to divert, or cause or permit to be diverted any food fish to any use other than human consumption, without having first obtained the written consent of the state market director to such destruction or diversion. Consent to such destruction or diversion shall be given only where the applicant establishes to the satisfaction of the state market director that such destruction or diversion is not for the purpose of influencing prices and that reasonable efforts have been made to induce its consumption by the public. Nothing in this section shall be construed to apply:

First.—To the use of food fish by fishermen as bait in the customary manner; and,

Second—To any individual market fisherman who is unable to sell for human consumption fish he has caught, and who within forty-eight hours after the destruction or diversion of said fish shall report to the state market director the number of pounds and varieties of fish and how disposed of. The deposit in the United States mail of a written statement of said facts, properly addressed to the state market director and stamped, shall be accepted as a sufficient report.

Third—To food fish in the possession of canners, curers or packers and which are not suitable for their use and which in consequence are destroyed or diverted to use other than human consumption; provided, that within forty-eight hours after the destruction or diversion of any such fish, the person responsible therefor shall report to the state market director the number of pounds and varieties of fish, reason for destruction or diversion and how disposed of. The deposit in the United States mail of a written statement of said facts, properly addressed to the state market director, shall be accepted as a sufficient report."

*Statutes of 1917, Chapter 803, Sections 4 and 7.*

It will thus be seen that no direct attempt was made by the Legislature to control reduction as such, though the provisions of Section 7 above quoted limited in an indirect way reduction for purposes other than human consumption. Two years later the Legislature of California passed the first act dealing directly with reduction. At the 1919 session the Legislature adopted an Act entitled:

"An act to conserve the fish supply in California by empowering the fish and game commission to regulate and control the handling of fish or other fishery products for the purpose of preventing deterioration or waste; to establish grades to which the fish or other fishery products offered for delivery to canners or preservers or to the fresh fish market must conform; to make regulations to insure the proper handling and delivery of fish or fishery products to canners, preservers or fresh fish dealers; to regulate and control the use of fish or other fishery products for reduction purposes, and to provide penalties for any violation of any of the provisions of this act."

*Statutes of 1919, page 1203.*

Sections 4 and 5 of that Act provided:

"Sec. 4. No person, firm or corporation engaged in the business of catching, buying, selling, canning, packing or preserving fish, shall suffer or permit, or cause any preventable deterioration, or wilfully do any act that might cause deterioration or waste of any fish caught or taken within or without the waters of this state and brought into this state, and no person, firm or corporation engaged in the business of catching, buying, selling, canning, packing or preserving fish or other fishery products shall sell or offer for sale or delivery, or deliver any fish or other fishery products, to any reduction plant or divert fish or other fishery products for reduction purposes without first having written permission from the fish and game commission, and no reduction plant shall accept or receive

any fish, other than fish offal, from any person, firm or corporation without such written permission."

"Sec. 5. No person, firm or corporation engaged in the business of taking or catching fish or other fishery products shall take, catch or kill more fish or other fishery products than the boat or boats operated by said person, firm or corporation can handle without preventable deterioration, waste or spoilage, and no person preserving fish or other fishery products shall accept or receive or agree to accept or receive more fish or other fishery products than the canning, packing or preserving plant or plants of such person, firm or corporation can handle without preventable deterioration, waste or spoilage, and no person dealing in fish shall take, catch or kill, accept or receive, or agree to accept or receive, more fish or other fishery products than such person, firm or corporation is able to handle without preventable deterioration, waste or spoilage."

*Statutes of 1919, Chapter 551, Secs. 4 and 5.*

Section 5 was amended in 1921, Statutes of 1921, page 459, to provide:

"No person, firm or corporation engaged in the business of taking or catching food fish or other fishery food products shall take or catch or kill more fish or other fishery products than the boat or boats owned or operated by said person, firm or corporation can handle and deliver to the fresh fish dealer in a condition fit for human consumption, or to a canner, packer or preserver of fish in a condition fit to be canned or

packed or preserved for human consumption . . . It shall be unlawful for any person, firm or corporation to buy or sell or receive or use any kind or species of fish fit for human consumption for reduction purposes except fish offal; provided, that any person, firm or corporation engaged in taking, catching or dealing in fresh fish or fishery products for human consumption, or any person, firm or corporation engaged in the business of canning, packing or preserving fish for human consumption, desiring to sell or deliver or use in a reduction plant any fish fit for human consumption shall file an application with the fish and game commission setting forth the kind or species and quantity of fish to be sold, delivered or used in a reduction plant. (Here follow procedural provisions for a hearing thereon.) If after hearing evidence upon said application it shall appear that there is no market for the fish referred to in said application and that the taking or using of said fish in a reduction plant will not tend to impair or deplete said species of fish an order may be made by the board of fish and game commissioners granting the privilege to take, catch or kill and deliver to or use in a reduction plant during a calendar month an amount of said fish not to exceed twenty-five per cent of the amount any such applicant, person, firm, or corporation can can or pack or preserve for human food during a calendar month. Said order shall not be granted for a period longer than a seasonal run of said kind or species of fish mentioned in said order."

*Statutes of 1921, page 459.*

It is to be noted that the term "reduction plant" was not defined by the statute in this act. The Supreme Court of California in 1925 in

*People* vs. *Monterey Fish Products Co.*, 195 Cal. 548, at 562,

in considering Chapter 551, Statutes of 1919, defined a reduction plant:

> "Having in mind the manifest policy of the act, which is the conservation of fish for the purpose of human consumption, we have no doubt that the expression 'reduction plant', as used therein, is at least sufficiently inclusive to apply to any plant engaged in the reduction of fish into other products which are not intended to be used, and are not in fact used, for human consumption."

At the 1925 session of the Legislature the 1919 act, *supra,* was amended to include therein a definition of the term "reduction plant."

*Statutes of 1925, page 595.*

That term was defined as follows:

> "(a) Reduction plant—where used in this act, applies to any plant engaged in the reduction of fish into products which are not intended to be used, and are not, in fact, used for human consumption. Any plant where fish are put through a reduction or extraction process shall be deemed to be a reduction plant, and shall be subject to all provisions and limitations of this act, unless a permit shall have been obtained as in this act provided."

*Statutes of 1925, Chap. 340, Sec. 4.*

It is apparent that under the provisions of these statutes one engaged in reducing fish to products fit for, intended for, and actually used for, human consumption did not come within the regulations dealing with "reduction plants" and was not subject to the restrictive provisions relating to such plants. However, the Legislature of California in 1929, amended the act of 1919 and placed all reduction plants under regulation.

*Statutes of 1929, page 901.*

Section 4 of the 1919 Act was amended to define a reduction plant as:

> "(a) Reduction plant, where used in this act, applies to any plant engaged in the reduction of fish into fish flour, fish meal, fish scrap, fertilizer, fish oil or other fishery products or by-products."

*Statutes of 1929, Chap. 525, Sec. 4.*

This definition is much broader in scope than the definition set up by the 1925 amendment and includes plants reducing fish into products intended for, fit for, and actually used for, human consumption. That such was the intent of the Legislature is evidenced by the proviso added to Section 5 of the Act by the 1929 amendment. As amended, that section read in part:

> "provided, further, that the fish and game commission may grant a revokable permit or permits in such amount and subject to such restrictions, rules or regulations as the fish and

game commission may adopt or prescribe to take and use fish by a reduction or extraction process for the manufacture of edible products fit for, intended to be used and in fact used for human consumption providing it shall be shown and appear to the satisfaction of the fish and game commission that such use of such fish will not tend to deplete the species, or result in waste or deterioration of such fish; and provided, further, that no such permit shall be granted unless at least fifty per cent (50%) of the wet weight of the whole round fish or all of the oil extracted from such fish is manufactured into such products within the State of California."

*Statutes of 1929, Chap. 525, Sec. 5.*

Reduction for purposes other than human consumption remained subject to the same limitations and restrictions as had theretofore been imposed. Reduction to products intended for, fit for and actually used for, human consumption was for the first time regulated by the provisions of the 1929 amendments. The present appellant, Bayside Fish Flour Company, operated under this statute and under permits in accordance with the statute although it attacked unsuccessfully the power of the Commission to limit the duration of the permit issued to the Bayside Fish Flour Company.

*Bayside Fish Flour Company* vs. *Zellerbach,* 124 Cal. App. 564.

All of the legislation dealing with the subject of reduction was repealed and superseded in 1933 by

the Fish and Game Code of the State of California, Statutes 1933, page 394.

Probably actuated by the thought that the conservation of food fish could best be accomplished by eliminating the distinction theretofore drawn between reduction for purposes other than human consumption and reduction for human consumption, the Legislature, in the adoption of the Fish and Game Code, eliminated the distinction and treated all reduction alike. The sections of the Fish and Game Code governing the subject are:

Sec. 1010. "Every person must procure a license for each plant or place of business to engage in the business of:

(a) Canning, curing, preserving or packing fish, taken from the waters of this State or brought into this State in a fresh condition.

(b) Manufacturing fish scrap, fish meal, fish oil, chicken feed or fertilizer from fish or fish offal.

(c) Dealing in mollusks or crustaceans by wholesale."

Sec. 1064. "It is unlawful to cause or permit any deterioration or waste of any fish taken in the waters of this State, or brought into this State or to take, receive or agree to receive more fish than can be used without deterioration, waste or spoilage. Except as allowed by this code, it is unlawful to use any fish, or part thereof, except fish offal, in a reduction plant or by a reduction process."

Sec. 1065. "Sardines may be taken for use in a reduction plant, or by a packer, only in

accordance with the provisions of this article, as follows: In districts 4, 4¾, 18, 19, 20, 20A, and 21 between November 1 and March 31; elsewhere in the State between August 1 and February 15. This section does not prohibit the taking of sardines for the purpose of salting, curing, smoking or drying or for the purpose of packing in cans commonly known as quarter-pound or square cans less than 10 ounces in net weight; provided, that in a ten-ounce can, fish of a size of not less than eight fish to the can may be used, and there shall be added to the commonly known quarter-pound can not less than one ounce of olive oil or a commercial salad oil, and a proportionately larger amount of such oil to the larger sizes of cans."

Sec. 1068. "The commission may grant a revocable permit, subject to such restrictions, rules or regulations as the commission may prescribe, to take and use fish by a reduction or extraction process. No reduction of fish shall be permitted which may tend to deplete the species, or result in waste or deterioration of fish".

Sec. 1076. "Any reduction plant in which any fish or any part thereof is used in violation of the provisions of this article, or in violation of any rule, regulation or order of the commission, is a nuisance. Whenever the existence of such nuisance is shown to the satisfaction of the superior court of the county in which the reduction plant is situated, by complaint filed in the name of the people of the State of California, the court may issue a temporary injunction to abate and prevent the continuance or recurrence of such nuisance.

"If the existence of a nuisance is established in an action, as provided herein, an order of abatement shall be entered as part of the judgment in the case, which order shall direct the closing, for twelve months, of the building or place where such nuisance was maintained, and during such time, said building or place shall be and remain in the custody of the court."

*Fish and Game Code,* Sections 1010, 1064, 1065, 1068 and 1076.

Under these provisions all persons desiring to engage in the business of reducing sardines in the State of California must first procure a permit so to do. The Fish and Game Commission is prohibited from permitting any reduction of fish which may tend to deplete the species. The reasons for the restrictions placed upon reduction are at once apparent. The process of reduction is simple and the amount of fish which can be used by such process is greatly in excess of the amount which may be canned or cured in the same period of time. Likewise the demand for canned or cured fish is a factor limiting the take of fish for such purposes, for canned or cured fish may not be diverted to purposes other than human consumption. On the other hand, not finding a market for fish flour for the purpose of human consumption, such flour may be profitably sold and used for stock feed, chicken feed and fertilizer. Indeed this fact was recognized by the Legislature in the 1929 amendment for in empowering the Fish and Game Commission to

issue permits for reduction the Legislature provided that:

> "provided, further, that the fish and game commission may grant a revokable permit or permits in such amount and subject to such restrictions, rules or regulations as the fish and game commission may adopt or prescribe to take and use fish by a reduction or extraction process for the manufacture of edible products fit for, intended to be used and in fact used for human consumption providing it shall be shown and appear to the satisfaction of the fish and game commission that such use of such fish will not tend to deplete the species, or result in waste or deterioration of such fish; and provided, further, *that no such permit shall be granted unless at least fifty per cent (50%) of the wet weight of the whole round fish or all of the oil extracted from such fish is manufactured into such products within the State of California".* (Italics ours.)
>
> *Statutes of 1929, page 901.*

It will thus be seen that the entire legislation dealing with reduction has been actuated by the purpose and desire to conserve the food fish of California. Since the adoption of the Fish and Game Code in 1933 all reduction of sardines has been carried on under permits issued without discrimination by the Fish and Game Commission under the authority conferred upon the Fish and Game Commission by Section 1068 of the Code. The Commission determines what tonnage may be

taken without tending to deplete the species and allocates that tonnage among applicants engaged in the reduction business.

## THE LEGISLATION IN QUESTION IS A VALID EXERCISE OF THE POLICE POWER AND NOT REPUGNANT TO ANY CONSTITUTIONAL PROVISION

Appellant contends that the statutes in question interfere with and place a burden upon interstate and foreign commerce; that the execution of the statute deprives appellant of property without due process of law; that the statute has no relation to the conservation of the natural resources of the State. In support of its first contention Appellant states that by reason of the fact that all of the fish used by it are brought into the State of California and the products manufactured by it are shipped and sold in interstate and foreign commerce, the enforcement of the provisions of the Fish and Game Code constitute a direct burden upon interstate commerce.

It is to be noted that the legislation does not by its terms purport to in any way affect commerce. If the questioned legislation does affect interstate commerce it does so but indirectly and incidentally. Obviously the legislation was designed to protect and conserve the food fish supply of California. Sardines are migratory and travel in schools. The same school which may be in State waters today

may be found upon the high seas tomorrow and vice versa; nor are there any distinguishing characteristics between sardines caught upon the high seas and those taken within State waters. From a practical standpoint it is impossible to adequately patrol the entire coast line of California to assure that persons operating reduction plants in California will not use therein sardines taken in California waters. In order therefore to adequately protect and conserve the food fish of California the Legislature has regulated the use to which such fish may be put when caught in State waters or brought into this State in a fresh condition.

The right of a State to exclude or prohibit the possession of fish or game during closed seasons notwithstanding the same may have been imported from without the State has been uniformly upheld as a necessary means to protect fish and game within the borders of the State.

*Silz* vs. *Hesterberg,* 211 U. S. 31;
*Ex parte Maier,* 103 Cal. 476;
*People* vs. *Magner,* 97 Ill. 320;

and such prohibition of possession is applicable in the case of fish caught on the high seas.

*Union Fishermen's etc. Co.* vs. *Shoemaker,* 36 Ore. 16; 193 Pac. 476.

The same rule applies to regulation of the use to which fish are subjected upon being brought into the State.

*Van Camp Sea Food Co.* vs. *Department of Natural Resources,* 30 Fed. (2d) 111.

In *Silz* vs. *Hesterberg, supra,* this court upheld the validity of a statute of the State of New York which prohibited the possession within that state of imported fish and game during the season when the taking or possession of such fish or game within the state was prohibited. In that case this court said:

> "It is contended, in this connection, that the protection of the game of the State does not require that a penalty be imposed for the possession out of season of imported game of the kind held by the relator. It is insisted that a method of inspection can be established which will distinguish the imported game from that of the domestic variety, and prevent confusion in its handling and selling. That such game can be distinguished from domestic game has been disclosed in the record of this case, and it may be that such inspection laws would be all that would be required for the protection of domestic game. But, subject to constitutional limitations the legisature of the State is authorized to pass measures for the protection of the people of the State in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted. In order to protect local game during the closed season it has been found expedient to make possession of all such game during that time, whether taken within or without the State, a misdemeanor. In other States of the Union such laws have been deemed essential, and have

been sustained by the courts. *Roth* v. *State,* 51 Ohio St. 209; *Ex parte Maier,* 103 California, 476; *Stevens* v. *The State,* 89 Maryland, 669; *Magner* v. *The People,* 97 Illinois, 320. It has been provided that the possession of certain kinds of game during the closed season shall be prohibited, owing to the possibility that dealers in game may sell birds of the domestic kind under the claim that they were taken in another State or country. The object of such laws is not to affect the legality of the taking of game in other States, but to protect the local game in the interest of the food supply of the people of the State. We cannot say that such purpose, frequently recognized and acted upon, is an abuse of the police power of the State, and as such to be declared void because contrary to the Fourteenth Amendment of the Constitution.

* * *. In the case at bar the interference with foreign commerce is only incidental and not the direct purpose of the enactment for the protection of the food supply and the domestic game of the State. It is provided in the New York statutes that game shall be taken only during certain seasons of the year, and to make this provision effectual it is further provided that the prohibited game shall not be possessed within the State during such times, and owing to the likelihood of fraud and deceit in the handling of such game the possession of game of the classes named is likewise prohibited, whether it is killed within or without the State. Such game may be legally imported during the open season and held and possessed

within the State of New York. It may be legally held in the closed season upon giving bond as provided by the statute against its sale. Incidentally these provisions may affect the right of one importing game to hold and dispose of it in the closed season but the effect is only incidental. The purpose of the law is not to regulate interstate commerce but by law alike applicable to foreign and domestic game to protect the people of the state in the right to use and enjoy the game of the state * * *. For the reason stated we think the Legislature in particulars in which the statute is here complained of, did not exceed the police power of the state nor run counter to the protection afforded the citizens of the State by the Constitution of the United States."

In *Ex parte Maier* (*supra*), the Supreme Court of California in upholding the validity of a similar statute of this state, said:

"The facility and ease with which the statutes for the protection of game have been evaded in the past is a matter of common knowledge. Deer and other game have been slaughtered during the closed season and foisted upon the market as game procured without the state, and owing to the practical impossibility in the great majority of cases of proving with certainty the source from which it was procured, the attempted enforcement of the statutes for its protection has largely proven abortive. These and like considerations no doubt actuated the legislature in the premises, and induced the enactment of the statute in its present stringent form. And we

know of no good reason why it should not be held to mean what it says. Similar statutes in other states have received a like construction."

In *Union Fishermen's etc.* vs. *Shoemaker* (*supra*), the Supreme Court of Oregon upheld the validity of an Oregon statute which prohibited the possession of salmon caught on the high seas beyond the Columbia River. The opinion in that case ably summed up the principles and reasons for sustaining such legislation, by the following language which appears on page 481 (193 Pacific) of the reported opinion:

"The preservation of fish and game has always been treated as being within the proper domain of the police power; and, consequently, when the lawmakers passed the act of 1919, they legislated concerning a subject which is clearly within the embrace of the police power. *Lawton* v. *Steele,* 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385; *Geer* v. *Connecticut,* 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793; *Silz* v. *Hesterberg,* 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75; *State* v. *Schumann,* 36 Or. 16, 25, 58 Pac. 661, 47 L. R. A. 153, 78 Am. St. Rep. 754.

The Legislature, it is true, is not the final judge of the limitations of the police power, and, since the legislative action must be reasonably necessary for the public benefit, the validity of all police regulations depends upon whether they can ultimately pass the judicial test of reasonableness; and yet, it is also true that it is the legislative function primarily to determine the necessity or expediency of measures adopted.

When, however, the courts are called upon to apply the judicial test of reasonableness, they will accord to the Legislature a large discretion in determining, not only what the interests of the public require, but also what measures are necessary for the protection of such interests. "*Lawton* v. *Steele,* 152 U. S. 133; 14 Sup. Ct. 499, 38 L. Ed. 385; *Silz* v. *Hesterberg,* 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75; *Ex parte Mon Luck,* 29 Or. 421, 426, 44 Pac. 693, 32 L. R. A. 738, 54 Am. St. Rep. 804; *Lorntsen* v. *Union Fisherman's Co.,* 71 Or. 540, 547, 143 Pac. 621; *State* v. *Redmon,* 134 Wis. 89, 114 N. W. 137, 14 L. R. A. (N. S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 409, 12 C. J. 933. Moreover, when applying the test of judicial reasonableness, the presumption is in favor of the reasonableness and validity of the regulation. 12 C. J. 934.

The plaintiffs insist that section 5 of the statute is an unreasonable police regulation, because it is unusual, fails to accomplish its avowed purpose and is unduly oppressive upon individuals 'and the financial resources of the great fishing industry.' That section 5 is unusual may be conceded; but it must also be conceded that the conditions attempted to be met are unusual. It is not unusual to find statutes prescribing closed seasons; nor is it unusual to find the law so framed as to make it unlawful to sell, purchase, or possess game or fish during the closed season, even if originally taken and brought from without the state which enacted the law. As already pointed out, the salmon 'runs' do not occur in all the streams at the same time, and consequently it is impracticable to pre-

scribe the same closed season for all the streams. When legislation is enacted for the protection of fish in the Columbia it must, in order to accomplish its purpose, be framed with reference to conditions found to exist in the waters of that river and it is manifest that section 5 was in fact framed with reference to the conditions existing there; and hence, the provisions of section 5 are unusual only to the extent that the conditions which called for the adoption of the measures were and are unusual.

Of course the state of Oregon has no jurisdiction over the waters of the Pacific Ocean beyond the three-mile line; nor did the state by the enactment of the statute in question attempt to make fishing beyond the three-mile limit unlawful. *The statute was adopted in order to make effective the prohibition against taking fish during the closed season from waters over which the state may rightfully exercise jurisdiction, and that the state has authority to do this is settled beyond controversy. Silz* v. *Hesterberg,* 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75." (Italics ours.)

Appellant's chief reliance is placed upon

*Foster Fountain Packing Co.* vs. *Haydel,* 278 U. S. 1.

An examination of that case discloses, however, that it does not support appellant's contention or is in any sense in point. The statute of the State of Louisiana there involved prohibited the shipment of unshelled shrimps to points without the State and the Court found that this prohibition was a

mere subterfuge to bring about the removal of packing and canning industries from the State of Mississippi to the State of Louisiana. The basis for the decision is found in the following paragraph of the opinion:

> "The facts alleged in the complaint, the details set forth in plaintiffs' affidavits and the provisions of the Act to be restrained show that the conservation of hulls and heads is a feigned and not the real purpose. They support plaintiffs' contention that the purpose of the enactment is to prevent the interstate movement of raw shrimp from the Louisiana marshes to the plants at Biloxi in order through commercial necessity to bring about the removal of the packing and canning industries from Mississippi to Louisiana. The conditions imposed by the Act upon the interstate movement of the meat and other products of shrimp are not intended and do not operate to conserve them for the use of the people of the State."

The provisions of the statute and facts involved in the instant case are essentially different from those in the *Foster Fountain Packing Co.* case. Upon its face the legislation in question here indicates that it was passed to conserve the food fish of California.

## THE LEGISLATION DOES NOT DEPRIVE APPELLANT OF THE EQUAL PROTECTION OF LAW

There is nothing in the record and nothing in appellant's brief which even suggests that appellant

is, under the provisions of the law, treated any differently, by either the statute or the administration thereof, than other persons engaged in the business of reducing fish. In speaking of the question of discrimination this Court in

*Soon Hing* vs. *Crowley,* 113 U. S. 703,

said at pages 708, 709:

> "The specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws."

The Supreme Court of California, in speaking of the question of classification in the case of

*People* vs. *Monterey Fish Products Co., supra,*

said at page 556:

> "When a legislative enactment is attacked upon this ground all presumptions and intendments are in favor of the reasonableness and fairness of the legislative action (5 Cal. Jur., sec. 628 et seq., and cases cited), and the decision of the legislature as to what is a sufficient distinction to warrant the classification will not

be overthrown by the courts unless it is palpably arbitrary (Id., sec. 832 et seq., and cases cited)."

To the same effect is

*Mono Power Co.* vs. *Los Angeles,* 33 Cal. App. 675.

As we have heretofore suggested the ability to dispose of reduced products for purposes other than human consumption indicates a sufficient distinction between that class of persons canning or curing fish which may not be diverted to purposes other than human consumption and those reducing fish.

## CONCLUSION

We sincerely hope and trust that we have been able sufficiently to present to this Court not only an understanding of the object and purpose of the legislation and what we so conscientiously believe to be more than ample reasons why it should be upheld and enforced, but also impart an appreciation of the great and vital importance that this case has to the people of the State of California in the preservation and protection of one of their most important and valuable natural resources.

It is respectfully submitted that the decree of the lower court should be affirmed.

Respectfully submitted.

U. S. WEBB,
Attorney General of the State
of California,

RALPH O. MARRON,
Deputy Attorney General,

DARWIN BRYAN,
Deputy Attorney General,
*Attorneys for Appellees.*

o